

after the question put by the police officer is a direct answer to that question.

There are, however, other elements in this case in support of the charge. The first respondent in the course of the preliminary stated in evidence: "I did not make any statement to A.S.P. Sunderaraj" and there was clearly evidence that he had made such statement; and the second respondent, in the course of the same inquiry, stated in evidence: "I told the Inspector lies and falsehoods to all his questions."

With regard to the last ground of appeal, it is clear that under sub-section (ii) of section 112 (as amended by section 2(b) of Ordinance No. 79 of 1952) that a person is bound to answer truly all questions put to him; he may *refuse* to answer questions which would have a tendency to expose him to a criminal charge or penalty or forfeiture, but if does answer he is bound to answer truly.

The appeal must therefore succeed; the order of the learned Magistrate acquitting and discharging the accused is set aside and there shall be separate trials in respect of the two charges against the two respondents before another Magistrate.

Appeal allowed.

MYDIN v. REG.

[A. Cr. J. (Spenser Wilkinson J.) November 15, 1955]

[Penang — Criminal Appeal No. 43 of 1955]

Common Gaming Houses Ordinance, 1953, ss. 4(1)(a), (b) & (2), 18(1)(d) and 19—Betting Ordinance, 1953, s. 4(1)(b)—Charges of permitting premises to be used as a common gaming house and of permitting premises to be used as a common betting house—Presumption.

In this case the appellant was charged with 2 charges (1) that he being the occupier of premises No. 21 Church Street did permit the premises to be used as a common gaming house by operating a lottery an offence under s. 4(1)(a) of the Common Gaming Houses Ordinance, and (2) that he being the occupier did permit the premises to be used as a common betting house an offence under s. 4(1)(b) of the Betting Ordinance.

The facts were that a police raid took place upon the premises on the day in question. The only normal means of entry and exit from the premises was the front door which could not be opened from outside. When the police party arrived they found the front door closed, but the left hand window was open. One of the police party saw an Indian inside the premises who took some papers out of a drawer of a table and went to the back portion of the premises. The police gained entry into the premises by going into a neighbouring house and scaling the wall so as to enter the premises by the top floor. Upon searching the premises they found under a stove in the kitchen various pieces of paper crumpled in a heap. These pieces of paper were proved to consist partly of punter's tickets in respect of betting on horse races and partly of documents relating to 1,000 and 10,000 character lottery. The police found in the kitchen an Indian who

said he was the cook. The appellant was shown to be the tenant of the premises and there was also some evidence that the front portion of the premises on the ground floor was sublet to one Batcha. There was no search warrant obtained either under the Common Gaming Houses Ordinance or the Betting Ordinance but, the Inspector who led the raid said he was empowered with the powers of a Senior Police Officer under the Common Gaming Houses Ordinance and that he entered the premises under s. 18(1)(d) of the said Ordinance.

At the conclusion of the case for the prosecution, the learned Dy. Public Prosecutor who conducted the case in the trial Court applied to amend each charge by substituting the word "owner" for the word "occupier" in each case. The charges were amended accordingly, the accused was re-charged and having claimed trial was called upon for his defence. At the conclusion of the case the learned Magistrate convicted the appellant upon both charges.

Held: (1) as there was no evidence to show that the premises had been entered in accordance with the provisions of the Betting Ordinance, the presumptions in that Ordinance did not arise; (2) the mere finding of betting slips upon premises is not by itself sufficient to prove that the premises have been used as a common betting house and therefore there was insufficient evidence, without the presumptions, to prove that the premises have been used as a common betting house; (3) there was evidence, although it was the barest minimum, that the entry to the premises had been made in accordance with the provisions of the Common Gaming Houses Ordinance; (4) the presumption under s. 19 of the Common Gaming Houses Ordinance could not be applied in this case, as the appellant was not charged with keeping or using the premises as a common gaming house; (5) the prosecution in this case had not proved that the appellant had let the kitchen for hire to the cook and that he was the owner of the premises, within the meaning of the Common Gaming Houses Ordinance and therefore the presumption under s. 4(2) of the Ordinance did not apply; (6) therefore the convictions on both charges must be quashed.

Cases referred to:—

- (1) *Lee Ching Seng v. Public Prosecutor* (1954) M.L.J. 181.
- (2) *R. v. Thong Chung Chong* (1938) M.L.J. 179.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Kheng Kooi for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.:—The appellant was originally charged under section 4(1)(a) of the Common Gaming Houses Ordinance, 1953 that being the occupier of premises No. 21, Church Street, Penang he used the premises as a common gaming house by operating a public lottery and secondly under section 4(1)(b) of the same Ordinance that at the same time and place he permitted the premises to be used as a common gaming house by operating a public lottery.

Before the evidence was led the first of these charges was withdrawn by the Public Prosecutor and the appellant was discharged in respect thereof, such discharge amounting to an acquittal. The second of

the original charges then become the first charge and a further charge was then added.

The two charges upon which the appellant claimed trial and upon which evidence was led were first the second charge above-mentioned (which then became the first charge) and secondly a charge under section 4(1)(b) of the Betting Ordinance, 1953 that at the same time and place he being the occupier permitted the premises to be used as a common betting house.

At the conclusion of the case for the prosecution the learned Deputy Public Prosecutor who conducted the case in the Court below applied to amend each charge by substituting the word "owner" for the word "occupier" in each case. The charges were amended accordingly. The accused claimed trial thereon and, after a submission of no case by Counsel for the defence, was called upon for his defence in respect of these two amended charges.

The facts were that at about 2 p.m. on the day in question a Police raid took place upon the premises. The only normal means of ingress and egress from these premises was the front door which could not be opened from the outside. The Police therefore gained entry by going into a neighbouring house and scaling the wall so as to enter No. 21, Church Street by the top floor. Having thus obtained entry the Police found in the kitchen an Indian who said he was the cook and who subsequently gave evidence as Prosecution Witness No. 4. Upon searching the premises there were found under a stove in the kitchen various pieces of paper crumpled in a heap. These pieces of paper were proved to consist partly of punters' tickets in respect of betting on horse races and partly of documents relating to a 1,000 and 10,000 character lottery. Nothing else incriminating was found on the premises.

Evidence was given by the agent of the landlord of the premises that the appellant was the tenant thereof paying a rent of \$75 a month to the landlord. There was also some evidence that the front portion of the premises on the ground floor was sub-let to one Batcha.

The only other material evidence was that given by one of the Police party who raided the premises that when the Police arrived and found the front door close the left-hand window was open and he saw inside an Indian who took some papers out of the drawer of a table and went into the back portion of the premises. This man was not the appellant and was not found in the house when the Police finally entered.

Upon this evidence the learned Magistrate called upon the appellant for his defence and ultimately convicted him upon both charges.

At the conclusion of the hearing of the appeal I quashed the conviction upon the second charge, because there was in my opinion no evidence to show that the premises had been entered in accordance with the provisions of the Betting Ordinance with the result that the presumptions in that Ordinance upon which the prosecution sought to rely did not arise. There was in my view insufficient evidence without these presumptions to prove the charge. The mere finding of betting slips upon premises is not by itself sufficient to prove that these premises have been used as a common betting house. This was decided by Buhagiar J. in the case of *Lee Ching Seng v. Public Prosecutor*⁽¹⁾, where he held that the fact that "instruments and appliances for gaming" are found in a place is not sufficient by itself to make that place a common gaming house. There was, it is true, some evidence in the present case that certain members of the public had access to the premises but not sufficient evidence to prove that they had access to those premises for the purposes of gaming. It was held in *Rex v. Thong Chung Chong*⁽²⁾ that the access to be proved in these cases is access for the purposes of gaming. The fact that the front door was shut and that no answer was received when the Police knocked is suspicious; but there are too many possible explanations of this for it to prove anything. Had there been a back door out of which people might have escaped whilst the Police knocked at the front door the position might have been different.

With regard to the first charge I have formed the same opinion that without reliance upon the presumptions contained in the Common Gaming Houses Ordinance, 1953 there was insufficient evidence upon which to convict.

As to these presumptions various points arise. It was submitted in the first place by Counsel for the appellant that it had not been proved that the premises had been entered in accordance with the provisions of the Ordinance.

Inspector Kong Fook Yew stated in evidence that he was empowered with the powers of a Senior Police Officer under the Common Gaming Houses Ordinance. In cross-examination he admitted that there was no search warrant and in re-examination he stated:—

"I entered No. 21, Church Street under s. 18(1)(d) of the Common Gaming Houses Ordinance."

Paragraph (d) of that sub-section provides that if a Senior Police Officer receives the required information orally under such circumstances that the object of a

search would in his opinion be defeated by the delay necessary for reducing the information to writing he may himself do what he could authorise a Police Officer to do under sections 16 and 17. There is a proviso to this paragraph (d) that if the information is not reduced into writing the name and address of the person giving the information are known to or ascertained by a Senior Police Officer before he acts upon such information.

Although in my opinion the manner in which the evidence was given in this case was irregular I held, though not without some doubt, that the statement of the Inspector that he entered under section 18(1) (d) was in fact equivalent to a statement that in his opinion the object of the search would be defeated by reducing the information into writing and that the name of the informant was known to him. There was, therefore, evidence (although it was the barest minimum) that the entry was made in accordance with the Ordinance.

The prosecution relied *inter alia* upon the provisions of section 19 of the Ordinance, the relevant provisions of which read as follows:—

"If any instruments or appliances for gaming are found in any place entered under this Ordinance it shall be presumed until the contrary is proved that the place is a common gaming house and that the same is so kept or used by the occupier thereof."

It will be seen therefore that if it had been established that the appellant was the occupier of the place where these documents were found, then, unless the presumption was rebutted, it would have to be presumed that the place was a common gaming house and that the appellant had himself so kept or used it. This, however, is not what the appellant was charged with because the charge was not that he himself used or kept but that he permitted the place to be kept or used by another person as a common gaming house. Without a further amendment of the charge, therefore, I do not think that section 19 could assist the prosecution case, and it is to be noted that the appellant had been acquitted in respect of using the premises.

The prosecution next relied upon the provisions of sub-section (2) of section 4, which read as follows:—

"(2) Any person who occupies or has the use temporarily of a place which is kept or used by another person as a common gaming house shall be presumed until the contrary is proved to have permitted such place to be so kept or used."

Before dealing with this sub-section I would remark that I find it difficult to see how the prosecution can rely simultaneously upon section 19 and section 4(2). If a place is kept or used by the occupier, then it

appears to me that there can be no question of permitting; and if it is a case of permitting then someone else must be shown to have used or kept the place. The two presumptions appear to me to deal with entirely separate kinds of case.

When I come to consider the provisions of section 4(2) in relation to the acts I find that the only evidence of use by another person of the kitchen as a common gaming house is the finding of these documents. This, as I have already held, is not by itself enough to prove use as a common gaming house. The evidence therefore does not appear to me to bring the case within the words "a place, which is kept or used by another person as a common gaming house."

Mr. Lim Kheng Kooi on behalf of the appellant further argued that the wording of sub-section (2) of section 4 excludes an owner and that as the appellant here was charged as the owner this sub-section could not apply to him. I am not, as at present advised, prepared to accept this proposition because I think it is clear that an owner may be an owner-occupier. I do not think it necessary, however, to decide this point in the present case, because I think in view of the way in which the case was conducted in the Court below the prosecution is precluded from arguing now that the appellant was an occupier. I think it is clear that at the close of the case for the prosecution it was conceded that the evidence had shown the appellant not to be the occupier because otherwise there could be no object in amending. If he were an owner-occupier he would still be an occupier. It was contended before me, as I understand the argument, that the appellant was the owner by reason of the provisions of section 2(1) of the Ordinance that "every person who demises or lets for hire a place shall be deemed the 'owner' thereof."

In my opinion, however, it was not proved that the appellant was the owner of these premises within the meaning of the Ordinance. It is suggested that the kitchen was "let for hire" to the cook. The evidence for the prosecution on this point depended solely upon the evidence of P.W. 4. He stated in effect that he was employed as a cook at No. 21, Church Street and that he provided midday meals there for about ten people daily, who paid him a fixed sum each month. This witness was treated by the prosecution as hostile and discredited by a reference to a previous inconsistent statement made by him to the Police; but even if part of his evidence could nevertheless be accepted I can find in it nothing to suggest that the

kitchen was let to him on hire. The appellant may have been the "owner" of that part of the premises which was sub-let to Batcha, but there is no sufficient evidence that that part was used as a common gaming house, and nothing was found there to raise any presumption.

In my opinion, therefore, when the prosecution amended the charges there ceased to be on the evidence a case which the appellant could have been called upon to meet and he should have been acquitted without being called upon for his defence.

This being my view I cannot, strictly speaking, look at the evidence for the defence for the purpose of supplementing the evidence for the prosecution. Even if I did, however, I do not think the evidence given by the appellant really satisfies this point. He says in evidence referring to the cook:—

"He pays me \$5 per month for using the kitchen."

In my opinion this does not constitute a letting for hire within the meaning of section 2(1) of the Ordinance. Taken in conjunction with the evidence of the cook it is at most a licence to use the kitchen at certain times of the day.

A further point taken on the appeal was that those parts of the evidence of Prosecution Witness No. 8 to the effect that this witness had placed bets with the appellant in No. 21 Church Street on numerous occasions prior to August, 1954 should not have been admitted. In the view I take of this case it is not necessary for me to decide this point.

For the reasons given above I am of opinion that the conviction upon the first charge as finally framed cannot stand. It remains to consider whether I could or should alter the charge or whether it would be proper for me to order a retrial.

I do not think I can uphold the conviction upon any altered charge. I am inclined to think myself that there was evidence upon which the learned Magistrate could have found that the appellant was an occupier of the premises and had the charge been one of actual user instead of permitting the presumption under section 19 of the Ordinance might have been raised and might have remained unrebutted. The appellant, however, has been acquitted on this charge and I cannot interfere with that acquittal even if I were inclined so to do.

I do not think it would be right to order a retrial in view of the fact that the prosecution have already amended the charges twice. Moreover, the prosecution evidence was far from being entirely satisfactory. The evidence of P. W. 4, as I have already remarked, was discredited and although I have not had the opportunity

of seeing the witnesses, it appears to me from the record that the evidence of P.W. 8 was entitled to no better consideration than that of the appellant.

Before parting with the case I would like to point out how important it is for Magistrates in their grounds of decision not only to make specific findings of fact but also to give a clear indication of which witnesses they believed and which not. In his grounds of decision in this case the learned Magistrate said:—

"Coming again to the evidence of Rajah Mohamed can I draw the inference that, if in August, 1954, the accused had something to do with a common betting house he had something to do with a common betting house on the 9th April, 1955? I think I am permitted to do this under s. 114 of the Evidence Ordinance, 1950. I am quite aware that this is a presumption of fact and that it is rebuttable. It is not rebutted in this case."

The appellant in his evidence clearly and categorically denied the evidence of the witness Rajah Mohamed. Why then does the Magistrate say that the presumption is not rebutted? I can only assume that he accepted the evidence of Rajah Mohamed in preference to that of the appellant, but he has not so stated and has given no reasons for doing so. Whilst it is not always necessary to give reasons for believing or disbelieving a particular witness it is in my view highly desirable to do so where there is a definite conflict between two witnesses and no other evidence upon the point in respect of which they conflict.

The conviction on the first charge is quashed and as I have already quashed the conviction on the other charge the accused is acquitted and discharged.

Appeal allowed

MOHAMED HUSSAIN & ANOR. v. PAVADISE

[C. A. (Pretheroe Ag. C.J., Spenser Wilkinson and Buhagiar JJ.) November 21, 1955]

[K. L.—F.M. Civil Appeal No. 14 of 1955]

Courts Ordinance, 1948, ss. 36, 37 and 70(3) — Appeal to Court of Appeal — Jurisdiction — Whether amount or value of subject matter at the trial is less than \$500 — Claim for possession of premises — Quantum of fact depending upon the credibility of witnesses — Whether appellate Court justified in overruling the decision of the trial Court.

Landlord and Tenant — Mode of assessing value to landlord of possession of his own house — Ejectment.

The appellants in this case claimed in the Sessions Court possession of certain premises upon the ground that the tenant had sublet the premises at rents which exceeded in the aggregate of 75% of the rent paid by the tenant to the landlord which was at the rate of \$75.00 a month. They also claimed mesne profits. The President of the